

**Federal-Tribal Leadership meeting
December 3, 2015
Treaty Rights at Risk Initiative**

Marine Shoreline Habitat: W. Washington Tribes' paper on Highest Astronomical Tide

Issue: The USACE Seattle District (NWS) utilizes the mean higher high water (MHHW) tidal datum as the landward extent of Clean Water Act (CWA) regulatory jurisdiction, and has been doing so since the 1970's when the CWA was promulgated. According to CWA regulations, the "high tide line" means the line of intersection between the land and the water's surface at the maximum height reached by a rising tide. It encompasses spring high tides and other high tides occurring with periodic frequency but does not include storm surges (33 CFR §328.3(d)). The MHHW is not an upper limit of tidal waters; rather, it is a calculated average of all the higher of the two daily high tides over the 19-year tidal cycle. The HAT is a one-time measurement of the highest tide occurring in the 19-year cycle. In Puget Sound, the MHHW is 1.5 to 2.5 feet below the highest astronomical tide (HAT). Property owners often choose to construct their shoreline armoring or other shoreline protection projects above the MHHW, thereby avoiding Corps jurisdiction and negatively impacting valuable shoreline habitat.ⁱ For example, forage fish such as surf smelt and Pacific sand lance rely upon the upper reaches of Puget Sound beaches for spawning. Studies have shown that in some cases, a third of the eggs were found above the MHHW mark.ⁱⁱ

Recommendation: The tribes seek implementation of HAT as the landward extent of the CWA Section 404 jurisdiction for the protection of critical shoreline habitat in all marine and estuarine areas in Washington State. Hold a meeting with the Corps, EPA, and tribes, on how to best implement HAT jurisdiction for § 404 permits, including implementing the EPA and Corps Memorandum of Understanding (governing determining geographic jurisdiction of CWA §404 permitting).

Desired outcome: Implementation of HAT as the landward extent of the CWA Section 404 jurisdiction for the protection of critical shoreline habitat in all marine and estuarine areas in Washington State.

ⁱ In contrast, NMFS uses the extreme high tide line as the landward boundary when designating critical habitat for ESA-listed salmon. The HAT boundary is the same as the extreme tide line.

ⁱⁱ See e.g., Penttila, D. 2011. Pilot tidal elevation of Surf Smelt spawn study. Prepared for Friends of the San Juans. Friday Harbor, WA. See also Whitman, T., D. Penttila, K. Krueger, P. Dionne, K. Pierce, Jr. and T. Quinn. 2014. Tidal elevation of surf smelt spawn habitat study for San Juan County Washington. Friends of the San Juans, Salish Sea Biological and Washington Department of Fish and Wildlife (Surf smelt spawning studies in the San Juan Islands found that 80 percent of incubating eggs were in the upper third of the beach)